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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN H. MAHONE,

Defendant and Appellant.

D074670

(Super. Ct. No. SCD272153)

APPEAL from a judgment of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed in part, sentence vacated and remanded with directions.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Seth M. Friedman and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Melvin H. Mahone of attempted premeditated murder with a firearm enhancement (Pen. Code,¹ §§ 664, 187, subd. (a), 12022.53, subds. (b) and (c)); two counts of assault with a firearm with personal use of a firearm (§§ 245, subd. (a)(2), 12022.5, subd. (a)); possession of a firearm with a violent felony prior conviction (§ 29900, subd. (a)(1)) and possession of a firearm by a felon (§ 29800, subd. (a)(1)).

Mahone admitted two prison prior convictions and one violent felony prison prior (§§ 667.5, 668); two strike priors (§ 667, subds. (b)-(i)) and two serious felony prior convictions (§ 667, subd. (a)(1)).

The trial court sentenced Mahone to an aggregate term of 25 years-to-life plus 40 years.

Mahone appeals but does not challenge his convictions or the sentence imposed. Instead, Mahone contends the case should be remanded in light of newly enacted Senate Bill No. 1393. That legislation amends section 1385, effective January 1, 2019, to grant trial courts the discretion to strike a serious felony prior conviction in the furtherance of justice. Mahone contends the statute must be applied retroactively to those cases not final on appeal as of January 1, 2019. The Attorney General properly agrees with Mahone that the case must be remanded for the purpose of permitting the trial court to

¹ All further statutory references are to the Penal Code unless otherwise specified.

exercise its newly granted discretion to strike the serious felony prior convictions in this case. We agree with the parties and remand for a new sentencing hearing.²

DISCUSSION

Senate Bill No. 1393, effective January 1, 2019, amended section 1385 to allow trial courts to strike serious felony prior convictions in the furtherance of justice. The only question with regard to applying the new legislation to this case is whether the statutory change must be applied retroactively to cases not final on appeal as of January 1, 2019. The courts which have considered the issue have held the statute must be applied retroactively in light of *In re Estrada* (1965) 63 Cal.2d 740. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 708-712; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-974.)

We agree with the courts which have considered Senate Bill No. 1393 and find it must be applied retroactively to Mahone's case which is not yet final on appeal. We will remand for resentencing.

² Given the limited scope of this appeal we will omit the traditional statement of facts.

DISPOSITION

The sentence is vacated, and the case remanded to the trial court with directions to allow Mahone to request the court to dismiss one or more of the serious felony prior convictions. The trial court should exercise its discretion to grant or deny the request. We express no opinion as to how the court should exercise its discretion.

If the court grants the request to strike the serious felony prior conviction it shall resentence Mahone accordingly and file an amended abstract of judgment with the Department of Corrections and Rehabilitation. If the court denies the request it shall reinstate the existing sentence. In all other respects the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.